(27,484)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 250.

FELIX GOULED

vs.

THE UNITED STATES OF AMERICA.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 28, 1920.

1 United States Circuit Court of Appeals for the Second Circuit.

FELIX GOULED, Plaintiff in Error,

against

THE UNITED STATES OF AMERICA, Defendant in Error.

Before Judges Ward, Rogers, and Hough.

This cause came here on a writ of error to a judgment of conviction entered in the District Court for the Southern District of New York.

On the hearing in this court certain questions of law arose, concerning which this court desires the instruction of the Supreme Court in order properly to decide the cause.

Statement of Fact.

The material facts revealed by the bill of exceptions and exhibits are as follows:

On 30th July, 1918, the Grand Jury for the Southern District of New York, by indictment duly charged plaintiff-in-error, together with one Vaughan and one Podell;

2 1st. With a conspiracy to defraud the United States,—in violation of Section 37, U. S. C. C.;

2d. With having devised a scheme or artifice to defraud and used the United States Post Office establishment for the purpose of executing the same,—in violation of Section 215, U. S. C. C.;

In January, 1918, certain officers of the Army of the United States attached to the "Intelligence Department" suspected at least Gouled and Vaughan (the latter being an officer of said Army) in respect of the honesty and integrity of their relations to each other concerning contracts for clothing or equipment with the United States.

At the same time one Cohen, who was a business acquaintance of Gouled's, was a private in said Army and also attached to said "Intelligence Department."

By the direction of the aforesaid officers, Cohen went to Gouled's office during the latter's absence and, under pretence of a friendly call, gained access to papers in said office and secretly possessed himself of several documents which he delivered to his said superior officers. One of these papers was by them subsequently turned over to the United States Attorney for the said judicial district.

Gouled did not know what Cohen had done until the latter appeared as a witness against him and on the witness stand detailed the circumstances.

3 On 17th June, 1918, an agent of the Department of Justice made affidavit before a United States Commissioner that there was in Gouled's office in New York City:

"Certain property, to wit: certain contracts of the said Felix Gouled with S. Lavinsky."

Which contracts,—continued the affidavit,—

"were used as the means of committing a felony, to wit: a violation of Section 39, U. S. C. C., in that the said Felix Gouled did use the said contracts as means for the bribery of a certain officer of the United States."

On this affidavit a search warrant, which was lost before trial and is not before this court, was issued by said Commissioner under authority of Title 11 of the Act of June 15, 1917 (40 Stat., 228).

By virtue of said warrant an unexecuted written agreement between Lavinsky and Gouled was seized and delivered to said United States Attorney.

Gouled has never been indicted for any offence covered by Section 39 U. S. C. C.

On 22d July 1918 another agent of the Department of Justice made affidavit before the said Commissioner that Gouled had at his said office,

"Certain letters, papers, documents and writings which * * * relate to, concern and have been used in the commission of a felony, to wit: a conspiracy to defraud the United States."

4 Upon said affidavit and by virtue of said Act of June 15, 1917, said Commissioner issued a search warrant directing the seizing and securing of "the letters, papers, documents and writings" described in the last mentioned affidavit.

Under this warrant there were seized an unknown number of papers, but especially two, together with the envelope containing one of them, viz:

(1) A written and signed contract between Gouled and one Steinthal; and

(2) A bill for disbursements and professional services rendered to Gouled by the defendant Podell,—who is an attorney at law.

These documents were likewise delivered to said United States Attorney.

All the paper writings so as aforesaid taken by virtue of said search warrants or either of them belonged to Gouled and were seized in his office, but none of them bore his signature except the Steinthal contract, and none had any pecuniary value except as so much paper stock; but all constituted evidence more or less injurious to Gouled when charged under the indictment subsequently found on July 30th.

After indictment found and before trial, motion was made by Gouled to compel said United States Attorney to return to him "all papers seized and taken from" his office on "the 17th of June and 22d of July respectively together with all memoranda, extracts taken therefrom and copies photographic or otherwise made therefrom."

This motion,—so far as the papers hereinabove enumer-
5 ated and described are concerned, was denied. The action of the District Court in denying said motion so made before trial is not assigned for error before us.

Subsequently and in October, 1918, the indictment came on for trial before a Judge other than the one who had entertained and denied the motion to return papers seized under said search warrant.

At said trial and before any evidence was introduced Gouled renewed the motion once denied and again (and on the same papers) demanded the return of all papers and documents seized under said search warrants or either of them.

The trial Judge followed the ruling previously made by his colleague and denied the motion, to which exception was duly taken.

The prosecuting attorney then offered in evidence against Gouled the paper writing so as aforesaid abstracted by Cohen from Gouled's office. Objection was made in that such action violated rights secured to Gouled by the 4th and 5th amendments to the Constitution of the United States. Objection was overruled and exception duly taken.

The prosecuting attorney did not offer in evidence the Stein-
6 thal contract taken from Gouled's office under the search warrant of July 22d, but he did offer in evidence against Gouled the duplicate original thereof obtained from the other party thereto, viz: Steinthal.

The introduction of this document was objected to because the seized original having been in the possession of the prosecutor, such possession must have suggested the existence of a counterpart, therefore the use of Steinthal's original as evidence against Gouled was also in violation of the rights secured to him by said 4th and 5th amendments. Objection was overruled and exception duly taken.

The prosecuting attorney also similarly offered in evidence the unsigned Lavinsky contract (seized under the search warrant of June 17th) and the Podell bill with its envelope (seized under the search warrant of July 22d).

Gouled objected to the admission of all these documents because they had been obtained and were being used in violation of rights secured to him by said 4th and 5th amendments. Objection was overruled and exception duly taken.

At trial Vaughan pleaded Guilty, the jury acquitted Podell and convicted Gouled, whereupon Gouled brought this writ of error and the cause is now pending in this Court.

7 *Questions Certified.*

1st. Is the secret taking or abstraction without force by a representative of any branch or subdivision of the Government of the

United States of a paper writing of evidential value only belonging to one suspected of crime and from the house or office of such person,—a violation of the 4th amendment?

2d. Is the admission of such paper writing in evidence against the same person when indicted for crime a violation of the 5th amendment?

3d. Are papers of no pecuniary value, but possessing evidential value against persons presently suspected and subsequently indicted under Sections 37 and 215, U. S. C. C., when taken under search warrants issued pursuant to Act of June 15, 1917, from the house or office of the person so suspected,—seized and taken in violation of the 4th amendment?

4th. If such papers so taken are admitted in evidence against the person from whose house or office they were taken, such person being then on trial for the crime of which he was accused in the affidavit for warrant,—is such admission in evidence a violation of the 5th amendment?

5th. If in the affidavit for search warrant under Act of June 15, 1917, the party whose premises are to be searched be charged with one crime and property be taken under the warrant issued
8 thereon,—can such property so seized be introduced in evidence against said party when on trial for a different offence?

6th. If papers of evidential value only be seized under a search warrant and the party from whose house or office they are taken be indicted;—if he then move before trial for the return of said papers and said motion is denied—is the court at trial bound in law to inquire as to the origin of or method of procuring said papers when they are offered in evidence against the party so indicted?

In accordance with the provisions of Section 239 U. S. Judicial Code, the foregoing questions of law are by the Circuit Court of Appeals of the United States for the Second Circuit hereby certified to the Supreme Court.

New York City, February 10, 1920.

H. G. WARD,
U. S. C. J.
HENRY WADE ROGERS,
U. S. C. J.
CHARLES M. HOUGH,
U. S. C. J.

9 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA,
Second Judicial Circuit, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of Felix Gouled vs. The

United States, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said court, at the City of New York, this 10th day of February, 1920.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. Felix Gouled vs. The United States of America. Certificate. Hough, Circuit Judge.

Endorsed on cover: File No. 27,484. U. S. Circuit Court of Appeals, 2d Circuit. Term No. 250. Felix Gouled vs. The United States of America. (Certificate.) Filed February 18th, 1920. File No. 27,484.

No. 250.

Supreme Court of the United States.

October Term, 1920

FELIX GOULED

vs.

THE UNITED STATES OF AMERICA.

On a Certificate from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR FELIX GOULED.

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AUTHORITIES CITED.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1920.

FELIX GOULED, AGAINST THE UNITED STATES OF AMERICA.	No. 250.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Statement of the Case.

In January, 1918, certain officers of the United States Army, attached to the Intelligence Department thereof, suspected Gouled and one Vaughan of dishonesty in connection with their relations to each other concerning contracts for clothing or equipment with the United States. At that time Vaughan was an officer of said Army, and one Cohen was a private therein, both attached to the Intelligence Department thereof, and Cohen was a business acquaintance of Gouled. During Gouled's absence from his office in January, 1918, said

Cohen, by direction of the aforesaid officers went to Gouled's office, and under pretense of a friendly visit or call gained access to papers therein, and secretly possessed himself of several documents, which he delivered to his aforesaid superior officers. One of these papers was by said officers subsequently turned over to the United States District Attorney for said judicial district (fol. 2).

On July 30, 1918, the Grand Jury for the Southern District of New York returned an indictment charging Gouled, together with Vaughan and one Podell, (1) with a conspiracy to defraud the United States in violation of Section 37 U. S. C. C.; and (2) with having devised a scheme or artifice to defraud and with having used the United States Post Office establishment for the purpose of executing the same, in violation of Section 215 U. S. C. C.

On the trial of defendants, the prosecuting attorney offered in evidence against Gouled the paper writing abstracted from Gouled's office as hereinbefore set out. Gouled objected to the introduction of said paper on the ground that its admission violated his rights under the Fourth and Fifth Amendments to the Federal Constitution, which objection was overruled, and an exception duly taken (fol. 5). Gouled did not know how Cohen had obtained the paper that was received in evidence until Cohen appeared as a witness against him and on the stand detailed the circumstances (fol. 2).

Prior to the indictment of defendant and on the 17th day of June, 1918, an agent of the Department of Justice made affidavit before a United States Commissioner that there was in Gouled's

office in New York "certain property, to wit, certain contracts of the said Felix Gouled with one S. Lavinsky", which contracts "were used as the means of committing a felony, to wit, a violation of Section 39 U. S. C. C., in that the said Felix Gouled did use the said contracts as means for the bribery of a certain officer of the United States." The Commissioner, under Title XI of the Act of June 15th, 1917, issued a search warrant on this affidavit, which search warrant was lost before trial and was not contained in the record before the Circuit Court of Appeals. Under said warrant an unexecuted written agreement between Lavinsky and Gouled was seized and delivered to the United States District Attorney. Gouled was not indicted for any offense covered by Section 39 U. S. C. C. (fol. 3).

On July 22, 1918, another agent of the Department of Justice made an affidavit before the same United States Commissioner that Gouled had at his office "certain letters, papers, documents and writings which * * * relate to, concern, and have been used in the commission of a felony, to wit, a conspiracy to defraud the United States." The Commissioner, under the Act of June 15, 1917, issued a search warrant on said affidavit directing the seizure of all the "letters, papers, documents and writings" described in said affidavit. Under this warrant a number of papers were seized, but especially two with the envelope containing one of them, viz., (1) a written and signed contract between Gouled and one Steinthal; and (2) a bill for disbursements and professional services rendered to Gouled by the defendant Podell, who is an attorney. These papers were delivered to the United States District Attorney. All the papers taken

by virtue of said search warrants belonged to Gouled and were seized in his office, but none of them bore his signature except the Steinthal contract, and none had any pecuniary value except as so much paper stock, but all constituted evidence more or less injurious to Gouled under the indictment subsequently found against him on July 30th, 1918 (fols. 3, 4).

Before his trial Gouled made a motion to compel the United States Attorney to return to him all papers seized and taken from "his office on the 17th of June and 22nd of July respectively, together with all memoranda, extracts taken therefrom, and copies, photographic or otherwise, made therefrom". This motion was denied. The action of the District Court in denying said motion is not assigned for error (fols. 4, 5). The opinion of the Court on the motion to compel the return of the papers will be found at 253 Federal Reporter 770. The Court, in disposing of the motion, said that the question of whether or not the use of the evidence may compel the defendant to be a witness against himself was prematurely raised, and should be decided when the proof was offered on the trial.

In October, 1918, the indictment came on for trial before a judge other than the one who entertained and denied the motion to return the papers seized under said search warrant. On the trial and before any evidence had been introduced, Gouled renewed the motion theretofore denied, and again (on the same papers) demanded the return of all papers and documents seized under said search warrants, or either of them. The trial judge followed the rule which had been previously made by his colleagues and denied the motion, to which exception was duly taken (fol. 5).

The Steinthal contract taken from Gouled's office under the search warrant of July 22d was not offered in evidence by the District Attorney, but he did offer in evidence against Gouled the duplicate original thereof obtained from Steinthal, the other party thereto. Gouled objected to the introduction of this document because the seized original having been in the possession of the prosecutor, such possession must have suggested the existence of the counterpart; therefore, that such use of Steinthal's original as evidence against Gouled was also in violation of the rights secured to him by said Fourth and Fifth Amendments. This objection was overruled and an exception taken (fol. 6).

The District Attorney also offered in evidence the unsigned Lavinsky contract seized under the search warrant of June 17th and the Podell bill with its envelope seized under the search warrant of July 22d. The admission of all these documents was objected to by Gouled because they had been obtained and were being used in violation of his rights under the Fourth and Fifth Amendments to the Federal Constitution. The objection was overruled and an exception duly taken (fol. 6).

On the trial defendant, Vaughan, pleaded guilty. The defendant, Podell, was acquitted, and Gouled was convicted, whereupon Gouled brought the judgment of conviction to the Circuit Court of Appeals by writ of error, and the cause is now pending in that Court. That Court, under the provisions of Section 239 of the United States Judicial Code, certified for the decision of this Court the following questions of law, to wit:

First.—Is the secret taking or abstraction without force by a representative of any

branch or subdivision of the Government of the United States of a paper writing of evidential value only belonging to one suspected of crime and from the house or office of such person—a violation of the Fourth Amendment?

Second.—Is the admission of such paper writing in evidence against the same person when indicted for crime a violation of the Fifth Amendment?

Third.—Are papers of no pecuniary value, but possessing evidential value against persons presently suspected and subsequently indicted under Sections 37 and 215, U. S. C. C., when taken under search warrants issued pursuant to Act of June 15, 1917, from the house or office of the person so suspected—seized and taken in violation of the Fourth Amendment?

Fourth.—If such papers so taken are admitted in evidence against the person from whose house or office they were taken, such person being then on trial for the crime of which he was accused in the affidavit for warrant—is such admission in evidence a violation of the Fifth Amendment?

Fifth.—If in the affidavit for search warrant under Act of June 15, 1917, the party whose premises are to be searched be charged with one crime and property be taken under the warrant issued thereon—can such property so seized be introduced in evidence against said party when on trial for a different offense?

Sixth.—If papers of evidential value only be seized under a search warrant and the party from whose house or office they are taken be indicted—if he then move before trial for the return of said papers and said motion is denied—is the court at trial bound in law to inquire as to the origin of or method of procuring said papers when they are offered in evidence against the party so indicted? (fols. 6-8).

BRIEF OF ARGUMENT.

POINT I.

The secret taking and abstraction of Gouled's private papers by the officers of the Intelligence Department of the United States Army for the purpose, in the manner, and under the circumstances set forth in the Certificate, constitutes an unreasonable search and seizure under the Fourth Amendment to the Federal Constitution.

In construing the Fourth and Fifth Amendments, it is appropriate to refer to certain historical events that occurred prior to the Revolutionary War, which we think will throw great light on the construction of said amendments and the reasons for their adoption.

One of the many grievances of the colonies prior to the Revolution related to the enforcement of the Acts of Trade by means of Writs of Assistance. Because of the great expense of the seven years' war, England was in need of increased revenue. It was discovered that said Acts had not been observed by the merchants of America, and especially by those residing at Boston. Instructions were sent from the mother country to the customs officers in America requiring the strict enforcement of said Acts. It seems that special warrants were first used in searching for and seizing smuggled goods, but they proved to be of little use because they contained the name of the informer, and were returnable. The informer in this way became known to an excited and angry community, and other informers were intimidated

into silence. The search warrants also described the places where the smuggled goods were deposited, and authorized the seizure of goods only in the place described in the warrant. Usually when the officer reached said place to execute the warrant the goods had disappeared, and such writs were practically useless.

The customs officers thereupon resorted to general "Writs of Assistance," which were first issued during the reign of George II. These writs by their terms expired six months after the death of the King in whose reign they were issued. On the death of George II in 1760 the question of the issuance of new writs was raised. These writs were resented by the colonies as representing a system incompatible with their independence. This system of spying was very distasteful to them, and their resentment was intensified by the genius of James Otis, who is considered the pioneer of the Revolution. The more the matter came into public prominence and its legality was discussed, the more profound became the feeling against the principle of such writs as threatening the political freedom of the Colonies. In 1761 Lechmere, Surveyor General, made application to the Superior Court for new writs to himself and his officers. A number of Boston merchants petitioned to be heard in opposition to this application. The application was heard at the February Term, 1762, of said Court. Gridley appeared for Lechmere and James Otis and Thatcher for the merchants in opposition. The question was reargued in November, 1762, by the same counsel, and in December the judges were unanimous in their opinion that the writ should issue, and on December 2d a writ was issued to Paxton. This

and subsequent writs authorized the officers "to enter, go upon, and search any ship, boat, or other vessel riding along or being within or coming to said port of Boston, as well as to search the persons thereon, and in the day time to enter vaults, cellars, warehouses, shops and other places to search for smuggled goods."

Otis placed his argument in opposition to said writs on the broad ground of the rights of the colonists as Englishmen. In a fiery, passionate address before the Superior Court he declared that the use of such writs was an act of tyranny similar to the abuse of power which had "cost one King of England his head and another his throne." He asserted that life, liberty and property are derived not from social confernment but "only from nature and the authority of nature; that they are inherent and indefeasible by any laws, contracts, etc., which men can devise." The people took up the cry, and it spread from the New England hills to the valleys of the Hudson, Delaware and James rivers. The argument of Otis created a profound impression among the people of all the colonies, and in a short time they were roused to resistance against the infringement of their liberties.

Immediately following this controversy about writs of assistance in America there occurred the great controversy in England between John Wilkes and the ministry of Lord Bute. Wilkes became the champion of public opinion and established a paper called the "North Briton," in which he, as the leader of the people, denounced the Bute ministry for making the Treaty of Paris between England and Spain in 1762. The people believed that said treaty had been procured by corruption,

and there was a burst of popular indignation and protest against it. A supplemental number (No. 45) of the "North Briton" contained an offensive and caustic criticism not only of the Cabinet and the unpopular Peace of Paris, but also of the King's message at the prorogation. Three days before he received any notice that Wilkes was the author of the "North Briton," Lord Halifax, as Secretary of State, issued as such a general warrant "to search for authors, printers and publishers," who were to be brought before him for examination. The messengers who held this roving commission arrested within a few days about forty-nine persons on mere suspicion, and among them were Leach, a printer, and Wilkes. The latter was committed to prison. In the warrant for the arrest of Wilkes and Leach the messengers were authorized to search not only for printers and publishers, but "to apprehend and seize, together with their papers," such as they might suspect. After Wilkes had been removed from his house the messengers returned, and, after ransacking his drawers, carried away all his private papers. Wilkes at the time of his arrest was a member of the House of Commons, and he applied on a writ of habeas corpus for his release, which was granted because of his privilege, but he was immediately prosecuted for seditious libel.

It was claimed by the Secretary of State that the right to issue a general search warrant of that character was established by the practice of the Star Chamber which, after its abolition, had been revived and revested in the Secretary by the Licensing Act of Charles II. In order to test the validity of that special part of the writ directing

the seizure of his papers, Wilkes commenced an action against Wood, the under Secretary of State, who had personally superintended the search of his house and the carrying away of his papers. He obtained a judgment against Wood. (Howell's State Trials, Vol. XIX, p. 1153). The Court stated that the "office precedents which have been produced since the Revolution are no justification of a practice in itself illegal and contrary to the fundamental principles of the Constitution."

A few years later the same question was again presented in the case of Entick *v.* Carrington, (Howell's State Trials, vol. 19, p. 1029), when the illegality of a general search warrant issued by the Secretary of State to seize the papers of the author of a seditious libel, even when the author was named, was finally and decisively settled against such a writ. That case was an action of trespass for entering plaintiff's dwelling house in November, 1762, and breaking open his desks, boxes, etc., and searching and examining his papers, under a warrant directing the defendants to seize the plaintiff, and to bring him together with his books and papers before the Secretary of State to be examined. In this case Sergeant Glynn, counsel for plaintiff, in discussing the question of law as to the power of the Secretary of State to issue such a warrant, said, among other things:

> "A power to issue such a warrant as this is contrary to the genius of the law of England, and even if they had found what they searched for, they could not have justified it under the law of England; but they did not find what they searched for; nor does it appear that the plaintiff was the author of any of the seditious papers mentioned in the warrant. So that it now appears that this enormous trespass and

violent proceeding has been done upon mere surmise. But the verdict says that such warrants have been granted by Secretaries of State ever since the Revolution. If they have, it is high time to put an end to them, for if they are held to be legal the liberty of this country is at an end. * * * It is the publishing of a libel which is the crime, and not the having it locked up in a private drawer in a man's study, but if having it in one's custody was a crime, no power can lawfully break into a man's house and study to search for evidence against him. This would be worse than the Spanish Inquisition, for ransacking a man's secret drawers and boxes to come at evidence against him is like racking his body to come at his secret thoughts. The warrant is to seize all plaintiff's books and papers, without exception, and carry them before Lord Halifax. What? Has the Secretary of State a right to see all a man's private letters of correspondence, family concerns, trade and business? This would be monstrous indeed, and if it were lawful, no man could endure to live in this country."

In deciding the case, Lord Camden said that if such writs were upheld, "the secret cabinets and bureaus of every subject in the kingdom will be thrown open to search and inspection of a messenger whenever the Secretary of State shall think fit to charge or even suspect a person to be the author, printer, or publisher of a seditious libel."

He further stated:

"Papers are the owner's goods and chattels; they are his dearest property and are so far from enduring a seizure that they will hardly bear an inspection. Though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of

those goods will be an aggravation of the trespass and demand more considerable damages in that respect. Where does the written law lie that gives any magistrate such a power? I can safely answer there is none, and therefore it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society."

He further stated:

"Lastly, it is urged as an argument of utility that such a search is a means of detecting offenses by discovering evidence. I wish some cases had been shown where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil cases. It has often been tried but never prevailed. * * * In the criminal law such a proceeding was never heard of; and yet there are some crimes, such for instance as murder, rape, robbery and housebreaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself, because all the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust. And it would seem that searching for evidence is disallowed upon the same principle."

In 1683 Algernon Sidney was tried on a charge of high treason in the Court of King's Bench before Lord Chief Justice Jeffries. The treason charge in the indictment was compassing and

imagining the death of the king. The overt acts of this treason were, among other things, "composing and writing a false and seditious libel with intent to persuade the people of the lawfulness of rebellion." On his trial one Lloyd testified that under the authority of a warrant from the Privy Council directing him to seize Sidney's papers, he searched his house about the latter end of June, 1683, and found some papers on the table which he testified he seized and took into his possession in Sidney's presence. He produced the papers on the trial which he believed to be part of those papers. Sidney himself seems to have asserted in one part of his defense that the papers given in evidence had been found in his study after his imprisonment. (9 Howell State Trials, pp. 868 and 1006). In discussing the question as to whether the overt acts set out in the indictment were proven, Sidney said:

> "They have proved a paper found in my study of Caligula and Nero; that is compassing the death of the king, is it? * * * I am indicted for conspiring the death of the king because such a paper is found in my house. * * *" (9 Howell State Trials, 8, 59).

In volume 2, Phillips State Trials, page 101, it is said:

> "But the incredible account of Lord Howard (one of the witnesses against Sidney), was to be patched up by papers found in a private closet! He (Sidney) insisted, that he was not bound by law to give an account of such papers. The writing was not proved upon him, and, if proved, it was not a crime. It would be the extreme of injustice, and contrary to all law and reason, to charge him with a treasonable design for having in his posses-

sion such speculative writings—papers found in an unfinished and imperfect state, written many years before, not proved to have been shown, or seen, or intended for publication; not composed with a view to any particular occasion, or to any individual government; not connected with any political plan or design, nor of a character likely to incite a rebellion; but a mere political argument written on general principles and intended solely to oppose the dangerous tenets of a certain political writer. What could be more absurd than to pretend that the papers, written perhaps twenty years before, perhaps even more, could have the least bearing on any recent design? What more unjust, than to select scraps from a great number of papers, in order to found upon them some partial inference and conclusion as to the intentions of the writer, which could be fairly collected only from the tenor of all the writings taken together? In writing his private thoughts, and discussing such speculative subjects, he had done only what is daily and lawfully practiced by men of studious habits. To think, and to write his thoughts, is the privilege of every man; and, until he impart them to others, or publish them to the world, he is not responsible for them to any person, nor amenable to the laws of his country."

Solicitor General Finch replied on the part of the Crown and said that the doctrine in the written papers which he insisted on as proving and manifesting the treasonable design were the following:

"That the King derives all his power from the people; that it is originally in the people; that the measure of subjection must be adjudged by the Parliament; and if the King does fall from doing his duty, he must expect that the people will exact it."

The leading statesmen of Revolutionary times in America were familiar with the life and writings of Algernon Sidney, and especially with his trial for treason in 1682 and his conviction by means of seizing his private papers, which constituted the principal evidence against him.

Judge Cooley, in his Principles of Constitutional Law, in a note on page 231, says:

"The seizure of the papers of Algernon Sidney which were made use of as the means of convicting him of treason, and of those of Wilkes about the time that the controversy between Great Britain and the American colonies was assuming threatening proportions, was probably the immediate occasion for this constitutional amendment."

When the Federal Constitution drafted by the Convention of 1787 was submitted to the States for ratification, one of the principal objections urged against it was the lack of a bill of rights setting forth and protecting the "natural and inalienable rights and liberties" of man as contained in the British Constitution and in the constitutions of several of the States adopted during the Revolutionary War. The people of the States were afraid of this great central government to which they were about to delegate so much power and over which the individual States would have so little control. They remembered well the oppressions that they had suffered at the hands of despotic royalty. They had only recently, at great cost both of blood and money, freed themselves from the tyranny of their oppressors, and desired to prevent the return to the day of search warrants in England and writs of assistance in Boston. A number of the States demanded as a

condition of ratifying the Constitution that amendments should be proposed at the first session of Congress to guarantee and secure the protection of the people against the assumption of such arbitrary and unauthorized power on the part of the Federal Government in respect of life, liberty and property. These demands were satisfactory to the Federalists, who agreed that they would aid in procuring the adoption of such amendments. The Constitution was accordingly adopted and at the first session of Congress thereafter the first ten amendments were proposed and subsequently adopted, thus safeguarding the rights of the people against any of the feared encroachment on their rights by the officials of the new government. (Withers *vs.* Buckley, 20 Howard 84; Barron *v.* Baltimore, 7 Peters 243).

In *Boyd* vs. *United States, 116 U. S. 616,* Judge Bradley, in discussing the construction to be given to the Fourth and Fifth Amendments, said:

> "In order to ascertain the nature of the proceedings intended by the 4th amendment to the Constitution under 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history of the controversies on the subject both in this country and in England."

He then refers to the practice which had prevailed in Massachusetts of issuing writs of assistance, to which we have already referred. He continued:

> "These things (use of writs of assistance) and the events which took place in England immediately following the argument about writs of assistance in Boston were fresh in the memories of those who achieved our in-

dependence and established our form of government."

He then relates the controversy between the English Government and John Wilkes and refers to the case of *Entick* vs. *Carrington, 19 Howell State Trials 1029* and the opinion of Lord Camden, who pronounced the judgment of the court in that case. He said:

> "It (the opinion of Lord Camden) was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British Constitution, and is quoted as such by the English authorities on that subject down to the present time. As every American statesman during our Revolutionary and formative period as a nation was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the fourth amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures."

After quoting liberally from the opinion of Lord Camden, he said:

> "Can we doubt that when the fourth and fifth amendments to the Constitution of the United States were penned and adopted, the language of Lord Camden was relied upon as expressing the true doctrine on the subject of searches and seizures and as furnishing the true *criteria* of the reasonable and unreasonable character of such searches and seizures. Could the men who proposed those amendments in the light of Lord Camden's opinion

> have put their hands to a law like those of March 3, 1863, and March 2, 1867, before recited? If they could not, would they have approved the fifth section of the Act of June 22, 1874, which was adopted as a substitute for the previous laws? It seems to us that the question cannot admit of a doubt. They never would have approved of them. The struggles against arbitrary power in which they had been engaged for more than twenty years would have been too deeply engraved in their memories to allow them to approve of such insidious disguises of the old grievances which they had so deeply abhorred."

Continuing, he said:

> "And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purpose of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."

It is clear from the foregoing historical events that the Fourth and Fifth amendments were placed in the Constitution for the purpose of preventing a person being compelled to testify against himself on the trial of a criminal cause either by putting him on the stand or by the search for and seizure of his private papers and using them in evidence against him.

We think it is obvious under the above authorities that the act of Cohen in taking, without Gouled's knowledge and consent, the paper (fol. 2) that was afterwards introduced in evidence (fol. 5)

was a violation of Gouled's constitutional rights under the Fourth and Fifth Amendments. Under the facts stated in the Certificate Cohen, in taking such private paper was acting for and in behalf of the Government in ferreting out the commission of crime against the United States in connection with contracts between Gouled and the United States for clothing and equipment. It is not necessary that Cohen should have been acting directly under the direction of the Department of Justice in order to constitute him agent, representative or employee of the Government. Cohen did not take defendant's private papers for his own benefit; he took them as the agent and employee of the Government, and delivered them to his superior officers who were in the service of the Government. These officers in turn delivered said papers to the District Attorney of the district in which the seizure was made. The District Attorney caused said papers to be received in evidence against defendant on the trial of this criminal case. Surely, there is no ground for the claim that Cohen was acting independently of the Government and on his own authority, and for his own benefit, in taking and abstracting Gouled's papers to be used as evidence against him.

The Constitution of the United States is, by its own declaration (Article VI, Section 2), "the supreme law of the land". The powers of the Federal Government are exercised through three great departments—the legislative, executive, and judicial. All these departments are, of course, subject to the restrictions and limitations imposed by the Constitution on the Federal Government.

Dodge vs. *Woolsey, 18 Howard 331;*
Murray's Lessee vs. *Hoboken Land & Improvement Co., 18 Howard 272;*

Barron vs. *Baltimore, 7 Peters 243;*
Withers vs. *Buckley, 20 Howard 84.*

The first ten amendments to the Federal Constitution are restrictions exclusively upon the power of the Federal Government.

Fox vs. *Ohio, 5 Howard 410;*
Presser vs. *Illinois, 116 U. S. 252;*
Smith vs. *Maryland, 18 Howard 76.*

In *Boyd* vs. *United States, 116 U. S. 626,* Judge Bradley held that the principles announced in the case of Entick *vs.* Carrington applied "to all invasions on the part of the Government and its employees of the sanctity of a man's home and the privacies of life."

In *Adams* vs. *United States, 192 U. S. 585,* Mr. Justice Day said:

> "The security intended to be guaranteed by the 4th amendment against wrongful search and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give remedy against such usurpations when attempted."

In *Bram* vs. *United States, 168 U. S. 532,* this Court, in speaking of the construction given the Fourth and Fifth Amendments in the Boyd case, said:

> "It was in that case demonstrated that both of these Amendments contemplated, perpetuating in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty, which had been secured in

> he mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change."

In *Weeks* vs. *United States, 232 U. S. 383,* this Court said:

> "The effect of the 4th amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

Judge Day further said at page 394:

> "In Adams *vs.* New York, 192 U. S. 585, this court said that the 4th amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law acting under legislative or judicial sanction. This protection is equally extended to the ac-

> tion of the Government and officers of the law acting under it. Boyd case, 116 U. S. 630. To sanction such proceeding would be to confirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution intended for the protection of the people against such unauthorized action."

Even if Cohen at the time he abstracted Gouled's papers exceeded his authority as an agent and employee of the Government, yet if they did not know how said papers had been obtained, they at least had knowledge of sufficient facts to put them on inquiry as to the manner in which they were obtained, which inquiry, if followed up with reasonable care, would have disclosed that said papers had been procured by an unlawful seizure by the Government's employee Cohen, and the Government officials are therefore charged by law with a knowledge of the manner in which said papers were obtained and, by using said papers against Gouled, adopted and ratified Cohen's wrongful act in taking them. As said in the Silverthorne case:

> "The case is not that of knowledge acquired through the wrongful act of a stranger, but it must be assumed that the Government planned or at all events ratified the the whole performance."

To reiterate, the Fourth Amendment is a limitation and restriction upon the Federal Government and upon each and every department thereof, not alone upon the judiciary or the marshal, or any particular agent or employee of the Government, but upon every person who takes and seizes papers for the Government. The restraining hand of the Government reaches the department, a clerk

of the department, or any more exalted officer of the Government when representing the Government.

In construing the Fourteenth Amendment, it was held in the *Civil Rights Cases, 109 U. S. 13,* that the amendment prohibited every department and officer of the State from violating the Fourteenth Amendment; and in *Risley* vs. *Utica, 168 Fed. 737,* it was held that whoever by virtue of a public position under a State Government deprives another of any right protected by such amendment was guilty of a violation thereof, his act being the act of the State.

It is obvious therefore that Cohen was the employee and representative of the Government at the time he seized and took possession of Gouled's papers.

The fact that the private papers wrongfully taken may have no pecuniary value, but evidential value only, does not justify the seizure, and render the paper so taken admissible in evidence against the defendant. The object of the Fourth Amendment was to prevent all invasions on the part of the Government and its employees of the "sanctity of a man's home and the privacies of life." *Boyd* vs. *United States, 116 U. S. 630.* The essence of the offense prohibited by the Fourth Amendment is "the invasion of his indefeasible right of personal security, personal liberty, and private property."

Judge Bradley, in the Boyd case, further quoted from the opinion of Lord Camden as follows:

> "Papers are the owner's goods and chattels. They are his dearest property and are so far from enduring a seizure that they will hardly bear inspection."

In *Cooley on Torts, Vol. II, page 623*, it is said:

> "An important civil right is intended to be secured by the provisions incorporated in the National and State Constitutions, which in substance declare that unreasonable searches and seizures shall be unlawful, and that all persons shall be secure in their persons, houses, papers and effects against them. In their origin these provisions had in view the mischiefs of such oppressive action by the Government or its officers as the seizing of papers to obtain evidence of intended crimes; but their protection goes much beyond such cases; it justly assumes that a man may have secrets of business, of friendship, or of more tender sentiments, to which his books, papers or letters may bear testimony, but with which the public have no concern; that he may even have secrets of shame which are so exclusively his own concern that others have no right to pry into or discuss them."

There is nothing in the language of the Fourth Amendment to indicate that a search and seizure of the private papers of a person is not unreasonable if said papers have no pecuniary or market value. It is plain from the history of said provision and from its language that the Fourth Amendment does not require that the papers seized shall have a pecuniary value.

The use of *force* in gaining possession of a person's papers is not necessary in order to make the taking an unreasonable search and seizure under the Fourth Amendment. It was not even necessary that there should be an actual entry on Gouled's premises to constitute a violation of the Fourth Amendment. (Boyd *vs.* United States, 116 U. S. 626; Perlman *vs.* United States, 247 U. S. 7). In this case Gouled's papers were taken by

Cohen in Gouled's absence and without his consent and under pretense of a friendly visit. In other words, the Government procured by stealth and craft what they could not do in a lawful manner either by subpoena *duces tecum*, by order of the Court, or by means of a search warrant. The Government does indirectly and by deceit and evasion what the law does not permit it to do directly, and then claims that the law permits it to retain and use the fruits of its furtive acts because it used merely deceit and not threats and force. Was it the intention of the framers of the Fourth Amendment to permit defendant's indefeasible right of personal security, personal liberty and private property to be invaded in any such manner as this? Is the rule of evidence adopted by some courts that a court in passing on the admissibility of testimony will not go into a collateral issue to determine how the testimony has been obtained—will such a rule be permitted to defeat a substantial right of the citizen under the Federal Constitution? Is there any real difference between the invasion of the defendant's rights in this case and the facts surrounding the taking of the papers in the Weeks' case, and are not the facts more extenuating in the Weeks' case than in this case? In that case the marshal without authority of process, if any such could have been legally issued, visited the room of the defendant in the defendant's absence for the declared purpose of obtaining additional testimony to support the charge against Weeks, and having gained admission to the house, probably by means of a boarder, as stated by Judge Day, took from the drawer of a chiffonier certain letters written to the defendant tending to show his guilt, where-

as in this case Cohen during Gouled's absence gained access to his office, and secretly possessed himself of certain documents and papers therein contained, and Gouled did not learn of the deceitful act of his acquaintance until Cohen appeared on the stand as a witness against Gouled. Which is the more dangerous violation of the rights of a citizen—the marshal who goes openly to the house of the person arrested for the avowed and declared purpose of taking his papers for use in a criminal case against him, or the faithless friend who, while in the service of the Government, goes to defendant's office, in his absence, for the express but concealed purpose of procuring defendant's papers, and having gained access to said office by virtue of this counterfeit friendship, secretly and without the knowledge of anyone takes and carries away defendant's private papers for the purpose of delivering them to the prosecuting officers of the Government? In the case of the marshal, you have an opportunity to make a motion to compel the return of your papers; in the case of the supposed friend you have not. In opening and ransacking defendant's desk and taking defendants private papers found therein, Cohen was guilty of a trespass. His act is none the less wrong because he may have been admitted to the office by an employee of the defendant, if such was the case. This did not entitle him to trespass upon and take for the Government defendant's private papers. It did not entitle him to pry or spy into defendant's privacies of life. The taking of Gouled's papers in this case constituted an *invasion* on the part of an employee of the Government of the sanctity of Gouled's office and the privacies of his life, the acts denounced in the Boyd

case. Cohen used all the force that was necessary to take and carry away Gouled's papers in order to constitute a violation of the Fourth Amendment. The opening of the drawer containing the desired papers, the untying of a knot, the picking up of the paper from Gouled's open desk and unfolding it, done without his knowledge or consent, constituted a trespass on Gouled's right of privacy and an unlawful search and seizure under the Fourth Amendment. The Constitution does not require the use of any degree or amount of force at all; any slight physical exertion by means of which the employee of the Government takes and carries away, opens, spies into, and reads the private papers of a person, without his knowledge or consent, is an unlawful search and seizure under said amendment. The taking of Gouled's papers by Cohen contains "the substance and essence" of a search and seizure and effects their substantial purpose, and such taking is an unreasonable search and seizure in violation of the Fourth Amendment. (Boyd *vs.* United States, 116 U. S. 626; Weeks *vs.* United States, 232 U. S. 383; Entick *vs.* Carrington, 19 State Trials, 1029).

If the search and seizure in this case is sustained, it will result in nullifying this provision of the Constitution, as the Government will see to it that papers are taken hereafter by stealth and deceit, rather than by brute strength.

POINT II.

The Court erred in receiving in evidence the paper writing taken from Gouled's possession by Cohen.

The second question certified (fol. 7) relates to the action of the trial court in receiving in evidence (fol. 5) over Gouled's objection the papers secretly taken by Cohen from Gouled under the direction of Cohen's superior officers attached to the Intelligence Department of the United States Army (fol. 2). We have discussed under Point I the unreasonable character of the search and seizure by which said papers were obtained by Cohen, as well as the fact that Cohen was acting as the agent and employee of the Federal Government at the time he seized and took possession of said papers. The question we are now to consider is the correctness of the action of the trial court in receiving in evidence said papers over Gouled's objection.

We assume the second question is directed at the rule adopted by many courts that evidence which is pertinent to the issue is admissible, although it may have been procured in an irregular or even in an illegal manner by a trespasser.

The Courts of many States hold that if the proffered evidence is competent, relevant and material, the Court on the trial of a criminal case will not enter upon a collateral issue to determine the manner in which said evidence was obtained. Let us consider the history and development of this extraordinary doctrine which disregards and ignores the protection of the fundamental law of the land which was adopted for the very purpose

of preventing what many courts have permitted. The source of this extreme and unwarranted doctrine announced by many of the State Courts is the doctrine of the court in the case of *Commonwealth* vs. *Dana, 2 Metcalf 329*. The indictment in that case was for conducting a lottery under a statute which prohibited the sale of lottery tickets or the possession of the same with intent to sell, or to offer them for sale. The warrant had been issued upon proper information and under it the defendant was taken and the lottery tickets and material seized. Judge Wilde, speaking for the Supreme Court of Massachusetts, said:

> "We are also of the opinion that the warrant in this case is in conformity with all the requisitions of the statute and the declaration of rights. The complaint is under oath, and alleges probable cause to authorize the search and seizure. The articles seized are described and the place in which they were concealed is designated with sufficient certainty. There could be no difficulty in ascertaining by inspection the articles which the officer was directed to seize. The place of concealment is alleged to be the office of the defendant, 2 Devonshire Street, rear of 23 State Street. The defendant occupied that office, and the fact that another person occupied it with him cannot be considered as constituting a material variance."

The unlawful possession of the lottery tickets was sufficient to sustain the issuance of the search warrant in that case.

After holding that the warrant was legal and unassailable, the Court said:

> "Admitting that the lottery tickets and materials were illegally seized, still this is

no legal objection to the admission of them in evidence. If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence, if they are pertinent to the issue, as they unquestionably were. When papers are offered in evidence the Court can take no notice of how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question. This point was decided in the cases of *Legatt* vs. *Tollervy, 14 East. 302,* and *Jordan* vs. *Lewis, 14 East. 306,* and we are entirely satisfied that the principles on which these cases were decided is sound and well established."

This is a noted decision for several reasons: (1) It is the first time such a doctrine was announced in a criminal case; (2) it has been followed by a number of State Courts and text book writers; and (3) if that rule of law is followed in the Federal courts it would nullify the Fourth and Fifth amendments to the Federal Constitution.

The case of *Legatt* vs. *Tollervey,* cited in said opinion, was an action on the case for malicious prosecution of plaintiff by defendant in Quarter Sessions for a felony, of which plaintiff was acquitted. Another bill was presented which the grand jury did not find. The plaintiff called an officer of that court who produced the indictment, but it did not appear that either the Court of Quarter Sessions or the Attorney General had authorized a copy to be given to the plaintiff, according to the rule of the Old Bailey, and the Court non-suited plaintiff. A motion was made for the setting aside of the non-suit on the ground

that the want of an order of the Court for a copy of the indictment was not necessary to found the plaintiff's right of action, whatever difficulty he might be under in obtaining the necessary proof. Best, Sergeant, opposed the rule and insisted that as the officer who produced the records from the Quarter Sessions had no authority from the Court nor fiat from the Attorney General, therefore the evidence was properly rejected. They referred to the general orders made by the judges at the Old Bailey in 16 Charles II that no copies of any indictment for felony should be given without special order, upon motion made in open Court at general gaol delivery. Shepherd, Sergeant, in support of the rule, insisted upon the admissibility of the records when ready to be produced, though the officer without an order for the purpose might not have been compellable to produce on subpœna *duces tecum*. The order can never be necessary to make the record or an examined copy evidence which is evidence *per se*, and the only evidence of the allegation of prior indictment. Lord Ellenborough, Chief Justice, said:

> "It is very clear that it is the duty of the officer charged with the custody of the records of the Court, not to produce a record but upon competent authority, which at the Old Bailey is obtained upon application to the Court, pursuant to the order which has long prevailed there; and with respect to the general records of the Realm upon application to the Attorney General. But if the officer shall, even without authority, have given a copy of a record, or produce the original, and that is properly proved in evidence, I cannot say that such evidence shall not be received. He may incur the penalty of his contempt of the Court, and he may be warned at the time of

his peril in so doing; and a discreet officer placed in such a position would doubtless, before he produced the record or give a copy of it, apply to the Court and state the circumstances of the case; and it cannot be doubted that he would be saved harmless in doing what, after such a disclosure, the Court should order him to do. But still I cannot help thinking that the rule laid down by Lord Chief Justice Lee in Jordan *vs.* Lewis is a correct one. The order made at the Old Bailey was there read by way of objection to the evidence offered, but the Chief Justice said that he could not refuse to let the plaintiff read the copy of the indictment, though obtained without an order of the Court for the purpose. If the production of such an order were essential to the validity of the evidence, then if the evidence of the record of acquittal on the former prosecution, or a true copy of it, were found as a fact in a special verdict, it would be immaterial unless the order of the Judge or court before whom it was tried, allowing it, were also approved and found. But can this be stated? Even if it were found negatively that the Judge or court had refused to allow the party acquitted a copy of the indictment; yet if, in the subsequent action for a malicious prosecution, the plaintiff gave in evidence that which he was able to prove to be in fact a true copy of the indictment, can it be said that it would not be available? With deference then to the opinion expressed by Mr. Baron Adams in the case cited by which alone the opinion of the learned Judge appears to have been governed on the trial of this case, I do not see how the circumstance of the copy, if the witness proved it to be a true copy of the record having been, as he says, surreptitiously taken, can affect the validity of the proof; though the officer's conduct in lending himself as a voluntary instrument to the plaintiff's purpose might proper-

> ly be animadverted upon by the court. The order made at the Old Bailey does not state actions against prosecutors cannot be maintained without an order first obtained for a copy of the indictment, but only that they cannot be maintained without copies. The other Judges assenting, the order for setting aside the non-suit was made absolute."

The question discussed in *Legatt* v. *Tollervey* is obviously a fundamentally different question from that involved in a criminal case where the Government wrongfully seizes papers in possession of a citizen and then seeks to use said papers to convict him of a felony. In the *Tollervey* case the question of the invasion of the constitutional rights of a defendant on trial was not involved.

Such a ruling, if applied in this case, will be subversive of an express constitutional guarantee, the enforcement of which is the avowed and peculiar duty of our courts, especially in cases so inherently involving questions of the life and liberty of the citizen.

This explains the inception of the doctrine that has heretofore existed in the various State courts of the country on this subject. Practically every opinion in the various State courts in which the question is discussed adopts the rule announced in *Commonwealth* v. *Dana, supra,* and lays down the rule that such constitutional guarantee does not cover the case of the acts of individual officers; that the State in neither judicial, legislative, nor executive capacity is chargeable with the suppression of wrongfully obtained evidence, and that the injured individual must seek his remedy against the officer for the trespass as though there was nothing more than an incidental civil injury involved.

We think a more wholesome view of the purpose, effect and scope of the Fourth and Fifth Amendments is entertained by this Court, as shown by its decisions in the Boyd, Weeks, and Silverthorne cases.

In *Weeks* vs. *United States, 232 U. S. 383*, the Court said:

> "The case in the aspect in which we are dealing with it involves the right of the Court in a criminal prosecution to retain for the purpose of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States Marshal holding no warrant for his arrest and none for the search of his premises. The accused without awaiting his trial made timely application to the Court for an order for the return of these papers as well as all other property. This application was denied. The letters were retained and put in evidence, after a further application at the beginning of the trial, both applications asserting the rights of the accused under the Fourth and Fifth Amendments to the Constitution. If letters and private documents can thus be seized and held and used in evidence against a citizen accused of a crime, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and so far as those thus placed are concerned, might just as well be stricken from the Constitution."

The Court further said:

> "We, therefore, reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States acting under the color of his office in direct violation of the constitutional rights of the accused; that having made a sea-

> sonable application for their return, which was heard and passed upon by the Court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the Court should have restored these letters to the accused. In holding them and permitting their use upon the trial we think prejudicial error was committed."

In *Silverthorne Lumber Co.* vs. *United States, 251 U. S. 385,* the Silverthorne Company was indicted by means of papers wrongfully taken from the office of the Silverthorne Company, a corporation, by a United States Marshal and a representative of the Department of Justice without a shadow of authority. Application was made to compel the return of what had been unlawfully taken. In the meantime, the District Attorney had caused photographs and copies of material papers taken from defendant's possessin to be made. The Court ordered the return of the original papers on the ground that they had been taken from Silverthorne's possession in violation of his constitutional rights, but refused to compel the return of the copies which were impounded by the Court. A new indictment was framed based on the knowledge obtained from the copies thus made. Subpoenaes were then served on defendants commanding them to produce the originals, which they refused to do. Contempt proceedings were instituted against Silverthorne and the Silverthorne Company, and they were found guilty of contempt. The company was fined $250, and Silverthorne ordered imprisoned until he should purge himself of contempt by producing the papers called for in the subpoena. One ground of the refusal was that the order of the court was in violation of their

constitutional rights under the Fourth Amendment. Mr. Justice Holmes, speaking for this Court, said:

> "The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means, which otherwise it would not have had. The proposition could not be presented more nakedly. It is that, although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, but not any advantages that the Government can gain from the object of its pursuit by doing the forbidden act. *Weeks* vs. *United States, 232 U. S. 383,* to be sure, had established that laying the papers directly before the Grand Jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion, such is not the law. It reduces the Fourth Amendment to a form of words. 232 U. S. 393). The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence in a cer-tain way shall not be used before the Court, but that it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

If the essence of the Fourth Amendment is that evidence acquired by an unreasonable search and

seizure not only shall not be used in court, but shall not be used at all, as stated by Judge Holmes in the *Silverthorne* case, then where do we get the authority for adding to the plain terms of said amendment the condition that the benefits and rights of the citizen thereunder are secured to him only in the event he makes a motion before trial to compel the return of the papers wrongfully taken; in other words, the failure to make such motion because of error of judgment on the part of counsel or because of ignorance of the seizure made by the government officials or employees, in substance and effect, makes the seizure lawful. Where do the courts derive their authority for imposing any such limitation on acts which are a plain violation of the citizen's rights under such amendment? Have the courts the power to emasculate said amendment at the very time and place the government seeks to use such papers for the very purpose the amendment was designed to prevent? It has been held in a number of cases by this court that such amendment should be given a construction as broad as the mischief against which it seeks to guard. (*Counselman* v. *Hitchcock*, 142 U. S. 547; *Boyd* v. *United States*, 116 U. S. 626.) But in the case of this particular amendment the courts seem inclined to devitalize it under the influence of the principle that "the end justifies the means", and for this purpose have invoked the aid of a rule of evidence which results in nullifying the amendment in a great many cases of wrongful searches and seizures. It is clear that a motion before trial to compel the return of papers wrongfully taken is not under all circumstances required on the part of the injured person, and even if appropriate, is not the exclusive remedy. We think the sensible and rea-

sonable view of the rights of the individual, which said amendment was designed to secure and protect, requires that the courts prevent the use of such papers or of information derived therefrom, when the papers are offered in evidence or when the information secured by means thereof is offered in evidence. This is the only remedy that is as broad as the evil said amendment was designed to prevent. There are many cases where the rights of the citizen under the Fourth Amendment cannot be protected except at the trial. Even in the case where the court has made an order directing the return of the papers before the trial, such order does not divest the government officials and employees of the knowledge and information acquired from the unlawful use of the papers wrongfully seized and returned under order of court. The gist of the offense under the Fourth Amendment, so far as it relates to papers, is the invasion of the privacies of life by wrongfully acquiring knowledge of the contents of a person's private papers; the return of the physical paper but permitting the trespasser to keep and use the information wrongfully obtained therefrom is like compelling the thief to return to the owner the skeleton of the stolen cow, but permiting him to retain the flesh and blood. Under the rule announced in *Commonwealth* v. *Dana, supra,* and in the New York and other cases, the government officials can proceed with impunity to use the information derived from said returned papers because the courts will not turn aside to the collateral inquiry as to how the evidence offered by the government has been procured. Yet Judge Holmes in the *Silverthorne* case (251 U. S. 385), says in substance that under the fourth amendment the papers wrongfully seized cannot be used

by the government employees at all either before the court or elsewhere in the endeavor to convict an accused person.

Again, a person may know that his papers have been seized by the breaking of his doors and desks by someone in his absence but may not know that employes of the Government are the guilty persons until the papers are offered in evidence against him on the trial of a criminal action; or suppose the agents of the Government deny the possession of defendant's papers wrongfully seized, yet produce them on the trial; how in such and many other cases can the courts protect the citizen except when the evidence is offered on the trial.

In the Weeks case this court held that the trial court in refusing to compel the district attorney to return certain papers unlawfully taken from a defendant and in permitting their use on the trial, committed prejudicial error. Is not this defendant just as much entitled to protection against the use of his papers unlawfully seized as Weeks was? Are not the facts surrounding the seizure the same in each case, except that the seizure in the one was open, and in the other secret? Does the fact that the invasion of defendant's constitutional rights has been accomplished by the Government in such a manner that he did not discover it until the trial deprive him of all relief against the wrongful act of the Government? If it does, then will not such holding result in nullifying the Fourth and Fifth Amendments in many cases? Will not the zealous officers of the Government say we cannot compel the defendant to produce his papers by subpoena *duces tecum*, nor by order of court, nor by search warrant, nor by taking them *vi et armis*, but we

may induce a friend of the defendant to gain access to his house and premises and secretly take his private papers, of which fact he will not be aware until his trial, and then it will be too late to prevent the use of such papers by the Government? The remedy by motion must be limited to cases in which the defendant had knowledge of the unlawful seizure. We submit that under the principles announced in the Boyd, Weeks and Silverthorne cases, the admission in evidence of the papers procured by Cohen from the defendant's office in his absence was an unlawful search and seizure under the fourth amendment, and was also a violation of that clause of the Fifth Amendment which prohibits compelling a person to testify against himself in a criminal case, and the 1st and 2nd questions certified should be answered in the affirmative.

POINT III.

The receipt in evidence of the papers taken under the search warrants dated June 17, 1918, and July 22, 1918, was error because (1) said papers were procured by means of an unreasonable search and seizure; and (2) the defendant was compelled to give testimony against himself.

We contend that the search warrants issued on June 17th, 1918, and July 22nd, 1918, are null and void because a search warrant cannot under the Federal Constitution be issued for the *sole* purpose of procuring from defendant his private papers to be used in evidence against him in a criminal case; that the 3rd and 4th questions cer-

tified involve the constitutionality of the Act of June 15th, 1917; that said Act is unconstitutional so far as it may be held to authorize the issuance of a search warrant to procure evidence to be used against a person in a criminal prosecution, even though the private papers so seized may have been used in the commission of the crime for which he is on trial. The certificate of the Circuit Court of Appeals does not show whether or not the private papers obtained under these warrants and received in evidence against defendant were used as the means of commiting a felony.

It is well settled that a search warrant cannot under the Federal Constitution be issued for the sole purpose of procuring private papers from a person to be used in evidence against him on the trial of a criminal case. The Certificate shows that at the time of the issuance of the search warrants of June 17th, 1918, and July 22nd, 1918, the defendant was suspected of the commission of a crime and that the search warrants were issued for the purpose of procuring evidence to use against him, and that he was subsequently charged by indictment with the crime set forth in the warrant of July 22nd, 1918, but was never indicted for the offense described in the affidavit on which the warrant of June 17th, 1918, was issued. A motion was made by defendant both before and on the trial, to compel the Government to return to defendant the papers taken under such search warrant. Both these motions were denied for the reasons hereinbefore set out.

In *Entick* v. *Carrington*, 19 State Trials 1074, Lord Camden said:

> "Lastly, it is urged as an argument of utility that such a search is the means of detecting offenses by discovering evidence. I wish some cases had been shown where the law

forceth evidence out of the owner's custody by process. * * * But our law has provided no paper searches in these criminal cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself; because all the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that searching for evidence is disallowed upon the same principle * * *"

In *Black on Constitutional Law*, page 613, it is said:

"As a general rule, search warrants are to be employed only as an aid in the enforcement of the criminal laws. They may be issued for the recovery of goods alleged to have been stolen, for the discovery of merchandise smuggled into the country and concealed to avoid the payment of duties, for intoxicating liquors kept or intended for sale in violation of law, for instruments and apparatus used in gambling, for the seizure of lottery tickets or materials for drawing a lottery, and for forged warrants, writs, certificates or other such legal documents.—Nor is this warrant ever allowed to be used solely as the means of obtaining evidence against a person accused of crime. It is true that in some few cases, as in the search for stolen goods, the discovery of the article in question may furnish an item of evidence against the possessor of it. But in all such cases either the complainant or the public has some interest in the property or in its destruction, and the finding of evidence is not the immediate reason

for issuing the warrant. But it was settled by the common law in the case of the 'general warrants' and has always been the understanding of the American people, that this process could not be employed as a means of gaining access to a man's house or his letters and papers for the mere and sole purpose of securing evidence to be used against him in a criminal or penal proceeding. Such methods would also be inconsistent with the great principle of constitutional law in criminal cases that no man shall be compelled to furnish evidence against himself."

At page 614 the same author says:

"It is within the power of a state legislature, in the exercise of its powers of police, to declare the possession of certain articles of property (such as intoxicating liquors, explosives, obscene publications, or gambling devices), either absolutely or in particular places and under particular circumstances, to be unlawful because they would be injurious, dangerous, or obnoxious, and it may authorize the issuance of search warrants and the seizure and confiscation or destruction of such articles, so it be by due process of law."

At page 615 the same author says:

"There are some cases in which the privacy of the dwelling must be subordinated to the enforcement of necessary police regulations for the preservation of the public health, particularly in populous cities. Thus, it may be necessary to search private houses for the purpose of inspecting their sanitary condition, or to ascertain the existence of a nuisance detrimental to health, or to discover persons who are affected with a dangerous disease such as threatens an epidemic."

In *Cooley's Constitutional Limitations*, 7th edition, page 431, it is said:

"The warrant is not allowed for the sole purpose of obtaining evidence of an intended crime; but only after lawful evidence of an offense actually committed. Nor even then is it allowable to invade one's privacy for the sole purpose of obtaining evidence against him, except in a few special cases where that which is the subject of the crime is supposed to be concealed, and the public or the complainant has an interest in it or in its destruction. Those special cases are familiar and well understood in the law. Search warrants have heretofore been allowed to search for stolen goods, for goods supposed to have been smuggled into the country in violation of the revenue laws, for implements of gaming or counterfeiting, for lottery tickets or prohibited liquors kept for sale contrary to law, for obscene books and papers kept for sale or circulation, and for powder or other explosive and dangerous materials so kept as to endanger the public safety. A statute which should permit the breaking and entering a man's house, and the examination of books and papers with a view to discover the evidence of crime, might possibly not be void on constitutional grounds in some other cases; but the power of the Legislature to authorize a resort to this process is one which can properly be exercised only in extreme cases, and it is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his desks broken open, his private books, letters, and papers exposed to prying curiosity, and to the misconstructions of ignorant and suspicious persons—all this under the direction of a mere ministerial officer.

"We think it would generally be safe for the legislature to regard all those searches and

seizures 'unreasonable' which have hitherto been unknown to the law and on that account to abstain from authorizing them, leaving parties and the public to the accustomed remedies."

In *Tiedeman on State and Federal Control of Persons and Property*, pages 788-789, it is said:

"Under no circumstances can a search warrant be issued in this country for the sole purpose of securing the necessary evidence for the State. Whenever the police officer shows probable cause for believing that stolen goods are secreted in the house of the supposed thief or some other person, and in all other cases where the house contains the goods the possession and use of which constitute the crime, that house may be searched, and so far, and in these cases, the State may, with the aid of a search warrant, procure evidence of the guilt of the accused. But ordinarily this is not permitted. A man's letters and papers and other effects cannot be searched in the aid of a criminal prosecution against him. Not only is this prohibited by the spirit of the constitutional provision in reference to the issue of search warrants, but likewise by another provision which provides that no one shall be compelled in any criminal case to be a witness against himself. But, as already stated, where the crime or misdemeanor consists of the possession or use of things, which are prohibited by the law, either because of their injurious effect upon the public, or because the goods belong to another, or when there is an unlawful detention of persons, search warrants may be issued for their recovery, when satisfactory evidence of their being stored in a particular dwelling is presented to the judicial officer who issues the writ."

Many lawyers have concluded from a hasty reading of the Fourth Amendment that a search warrant may be obtained for the asking for any purpose and that every seizure made under a search warrant is lawful, even where the papers seized are to be used in evidence against the person from whom they are taken. The above authorities, however, show the fallacy of this conclusion. Mr. Justic Bradley in *Boyd* vs. *United States, 116 U. S. 626*, refers to the different classes of cases in which a search warrant may be used to seize property or papers. He says:

> "The search for and seizure of stolen or forfeited goods or goods liable to duties and concealed to avoid the payment thereof are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the Government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own Revenue Acts from the commencement of the Government. * * * * So also the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessariily excepted out of the category of unreasonable searches and seizures. So also the laws which provide for the search and seizure of articles and things which it is unlawful

for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, etc., are not within this category. * * *"

"But when examined with care, it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods, the owner from whom they were stolen is entitled to their possession; and in the case of excisable or dutiable articles, the Government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment; and in the case of goods seized on attachment or execution, the creditor is entitled to their seizure in satisfaction of his debt; and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civil to effect the ends of justice, and is no more than what the court of chancery would direct on a bill for discovery; whereas, by the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property. * * *"

After quoting from the opinion of Lord Camden in Enthick *vs.* Carrington, he said:

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rum-

maging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory *extortion* of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other."

But no case goes to the extent of holding that a search warrant may be issued to search for and take from the possession of the defendant his private papers for the sole purpose of using them in evidence against him, even though they may have been used in the commission of a crime. Of course, if the possession of said papers by the suspected or indicted person in itself constitutes a crime, then a search warrant could issue.

The Act of June 15, 1917, is unconstitutional so far as it may be claimed as authority for the issuance of warrants to search for and seize private papers from the possession of the owner, to be used against him in a criminal case.

Section 2, Title XI, Chapter 30, of an Act passed June 15, 1917, entitled "An Act to punish acts of interference with foreign relations, the neutrality and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes", provides that search warrants

may issue under said title upon either of the following grounds:

1. When the property was stolen or embezzled in violation of a law of the United States, etc.
2. When the property was used as the means of committing a felony, etc.
3. When the property or any paper is used in violation of Section 22 of this title.

Section 22 of said title provides:

> "Whoever, in aid of any foreign government, shall knowingly and wilfully have possession of or control over any property or papers designed or intended for use or which is used as the means of violating any penal statute, or any of the rights or obligations of the United States under any treaty or the law of nations, shall be fined not more than $1,000. or imprisoned for not more than two years, or both."

If the Government cannot compel a defendant to produce a private paper by subpoena *duces tecum*, to be used in evidence against him, because this would be compelling him to testify against himself in violation of the Fifth Amendment, and if the production of the same paper for the same purpose cannot be affected by a search and seizure because this would in substance and effect be a violation of the Fifth Amendment in that it would be compelling a person to testify against himself, and if any search and seizure that accomplishes the same purpose is an unreasonable search and seizure under the Fourth Amendment, how is it possible to hold that Congress can by statute authorize the issuance of a search warrant to search for and seize private papers of a person to be used

in evidence against him? Such a statute is unconstitutional because it is in violation of both the Fourth and Fifth Amendments. It accomplishes the same purpose as would be accomplished by a subpoena *duces tecum*. The issuance of a search warrant cannot change the effect of the transaction. If seizing the defendant's papers without warrant and using them in evidence against him would be a violation of the Fourth and Fifth Amendments, so would seizing them under a search warrant solely for that purpose.

The Congressional Record, 1st Session of the 65th Congress, pp. 3306 *et seq.*, and 3349 *et seq.*, shows that the search warrant title of said Act is based on the New York statute regulating the issuance of search warrants. The New York law on this subject, and similar laws in other States, we think, are the result of the rule adopted in various State courts that evidence which is pertinent to the issue in a criminal action is admissible even though it may have been procured by an unlawful search and seizure. Naturally, the effect of that ruling has been to stimulate raids by police and other officers on the homes and offices of persons charged with crimes in order to procure their private papers for use as evidence against them on the trial. While these raids are clearly unlawful and a violation of defendant's rights even under the State constitutions, they have been sanctioned by a majority of the courts so far as relates to the use in evidence of the private papers obtained thereby. In view of the fact, however, that such unlawful raids are calculated to result in homicides and to provoke breaches of the peace, the Legislatures of many States have sought to give said raids a legal standing by drawing a distinc-

tion between evidence used as the means of committing a crime and evidence not so used, and have enacted laws providing for the issuance of search warrants to procure possession of evidence of the former kind, even though it consist of private papers in the possession of a defendant. So far as a citizen's rights under the Fourth Amendment are concerned, should there be any difference in principle between private papers used as the means of committing a felony and private papers not so used, but just as important to the Government as evidence for the purpose of securing a conviction? The Government needs both kinds of papers solely as evidence. Both belong to defendant, and even if both could be used as evidence by the Government, defendant is entitled to the return of both alike after his acquittal or conviction.

Under the rule laid down by Lord Camden, there is no difference between private papers that have been used by defendant as the means of committing a crime and private papers not so used. The private papers seized in Gouled's possession, even if they have been used as the means of committing a felony, do not come within any of the common law exceptions laid down by Lord Camden, and fully restated by this Court in the Boyd case. There is no principle of law supporting any of said exceptions that confers the right to issue a search warrant for the sole purpose of seizing a man's private papers to use them in evidence against him in a criminal action.

The correct rule, we think, for determining when a search warrant may issue under the Constitution is whether or not the Government has the right to the possession of the defendant's prop-

erty (for which a search warrant is desired) for any purpose other than for use as evidence against defendant. If it has not, then a search warrant may not issue. If it has such right for some other purpose than for use as evidence, then the search warrant may issue. In the case of stolen goods, the person has neither the title nor the right of possession against the lawful owner, and the Government has the right to take possession in this peremptory and summary manner for the purpose of taking the property from the thief and delivering it to whomsoever may be entitled thereto, and incidentally to use it as evidence against the thief. In the case of counterfeit money, the possession may be *prima facie* evidence of a crime and the Government has a right to take possession and destroy said property and incidentally to use it as evidence either against the person from whose possession it was taken or any other person concerned either in uttering or circulating it; and the same rule applies to lottery tickets, burglar's tools, to a forged will or deed, to narcotics, and many other similar kinds of property. In all these cases, the possession by the person from whom taken is a crime, and the Government has some special property in or lien upon or right to the possession of the property as against the person holding the same, which independently of its use as evidence, entitles the Government to procure a search warrant for its seizure to be disposed of according to law.

Even if said Act of June 15th, 1917, regulating the issuance of search warrants be held constitutional, it does not authorize a warrant for the seizure of *private papers* in the possession of a person suspected of the commission of a crime.

The search warrants in this case were issued under the provisions of sub-division 2, Section 2, Title XI, Chapter 30, of said Act.

It is clear that Congress in drafting said Act drew a distinction between *property* and *a paper;* it did not intend that the word "property" used in said sub-division 2 of Section 2 of said Act should include *papers.* Said sub-division does not use the word *paper,* but only the word *property.*

The next sub-division (3) of said Section 2, authorizes the issuance of a search warrant "when the *property* or any paper is used in violation of Section 22" of said Title and said Section 22, makes it a penal offense for any one knowingly and wilfully to have in his possession or under his control in aid of any foreign government "any property or papers designed or intended for use or which is used as the means of violating any penal statute or any of the rights or obligations of the United States under any treaty or the law of nations." If Congress intended that the word *property* in the second sub-division of said Section 2 should include *a paper,* why did it consider it necessary in said sub-division 3 of Section 2 to insert after the word *paper* the phrase "or any paper"; and why, if the word *property* includes *a paper,* did Congress find it necessary to use the words "any papers" in addition to the word *property* in said Section 22 of Title XI, Chapter 30, of the Act of June 15th, 1917? We think that Congress intended that the word *property* used in said sub-division 2 of Section 2 should include only property the possession of which was a crime under the Federal Statutes; that possession of such property under the circumstances prohibited by law constitutes "property

by means of which a felony was committed" within the purpose and intent of said sub-division 2. The search warrant title of the Act of June 15th, 1917, can, in our opinion, be sustained only if the word *property* is so construed as not to authorize the seizure of private papers in the possession of defendant, unless the papers are of such character that the possession thereof is of itself a crime.

This construction of the word *property* is strengthened by the history of the Espionage Bill in Congress. The Bill (No. 291) introduced in the House on April 2, 1917, provided in Section 1 that before any search warrant should be issued, the officer or person desiring its issuance should make a written application, duly verified by his oath or affirmation, to the proper officer of the district wherein the *property or papers* are known or believed to be located, setting out the following matters:

(1) The authority under which the applicant seeks to enforce or assist in enforcing the law of nations, the treaty obligations or statute law of the United States, which he alleges has been, is being, or is intended to be violated;

(2) Facts upon which his knowledge is based that there is a violation of said laws, treaties, etc.;

(3) A description of the *property or papers* for which a search warrant is desired.

Section 2 provides for the issuance of a search warrant by the officer named in the statute upon his being satisfied that there is probable cause to believe that the *property or papers* described have been, are being, or are intended to be pos-

sessed, used or employed in the manner set out in said application.

Section 3 provides that

> Whenever any "*property or papers*" shall be seized or detained under such a search warrant, the owner or claimant may file with the officer issuing the search warrant his petition setting out his claim of title or ownership and any other facts tending to require the restoration of the *property or papers* to claimant, and the officer issuing the warrant shall determine the facts after notice to the District Attorney, and authorizes him to order the property restored to the owner, or "shall order the same retained in the custody of the person seizing the same to be used as evidence in any case or proceeding, civil or criminal, in which the United States may be interested, or to be otherwise disposed of according to law."

The Espionage Bill (No. 2) introduced in the Senate in April 1917 provided, among other things, that

> "A search warrant may be issued in accordance with the provisions of this Act for the purpose of searching any premises or person to discover any *property or papers* held, secured, or used in violation of or in aid of a violation of any penal law of the United States, or of a treaty of the United States, or of the rights or obligations of the United States under the law of nations."

When Bill No. 291 passed the House and went to the Senate, the Senate was considering its Bill. It did not take up the consideration of the House Bill but continued the consideration of its own

Bill and after perfecting and agreeing to its Bill, it took up the House Bill and, without giving it much consideration, adopted the Senate Bill, as it had been perfected, as an amendment for the House Bill by striking out all of the House Bill after the enacting clause and substituting the Senate Bill as it had been agreed upon in the Senate.

When these Bills went to a Conference Committee of the House and Senate, Title XI relating to search warrants was entirely re-written and said Committee agreed on the law in its present form. (See Congressional Record, First Session, 65th Congress, pages 3033, 3063, 3124 and 3306.)

It will be observed that the law as passed is radically different from the Bills introduced in both the House and Senate, particularly on the subject of the seizure of *papers*, and we contend that the law as it now stands only authorizes a search warrant for the seizure of papers when it is a criminal offense under Section 22 of the Search Warrant Law to have said papers in one's possession for the purpose of being used in violation of law in aid of a foreign government. The sweeping provisions of the original Bills introduced in the House and Senate with respect to the seizure of *papers* were finally so limited as to authorize the seizure of papers as distinguished from other kinds of property only where said papers were in the possession or control of a person in violation of the provisions of Section 22 of the search warrant title of the Espionage Law of June 15th, 1917.

It is evident that the change in the language of said Bill was caused by the opposition to the Bills based on the fact that the search warrant

title thereof was in violation of the Fourth and Fifth Amendments to the Federal Constitution. (See Congressional Record, First Session, 65th Congress, pages 1801 *et seq.*, 1850, 1853, 1854, 1856, 2065 *et seq.*)

We, therefore, contend that the papers seized and taken from Gouled's possession under the search warrants of June 17th, 1918, and July 22nd, 1918, for the sole purpose of being used as evidence against him, were unlawfully seized; that the Constitution prohibits a seizure for such a purpose; that the said seizure cannot be justified under the Act of June 15th, 1917, because said Act is in conflict with the Fourth Amendment if it be construed as authorizing the issuance of a search warrant for such purpose; that legislation cannot abridge a constitutional privilege (*Counselman* vs. *Hitchcock, 142 U. S. 547*); that no legislation can be enacted authorizing the issuance of a search warrant except in cases analogous to those in which search warrants have been issued at common law, and that such warrants could not be issued at common law for the sole purpose of procuring evidence from the possession of the defendant to be used against him in a criminal action; that said papers having been unlawfully seized and taken under search warrants were improperly received in evidence over Gouled's objection (*Silverthorne* vs. *United States, 251 U. S. 385)*; that the original contract between Gouled and Steinthal was unlawfully seized under the search warrant of July 22nd, 1918 (fol. 4); and that the possession of said original contract furnished the Government officers the information which led to the knowledge of the evidence of the duplicate original in Steinthal's possession, which duplicate original was received in evidence; that

said use of the original contract so unlawfully seized constituted a violation of defendant's rights under the Fourth Amendment *(Silverthorne vs. United States, supra)*; and that the admission in evidence of each of the papers described in said search warrants compelled Gouled to testify against himself in violation of the Fifth Amendment; that the word *property* in sub-division 2 of Section 2 of Title XI of Chapter 30 of the Act of June 15th, 1917, does not include *papers*.

POINT IV.

If papers belonging to a person are seized by virtue of a search warrant based on an affidavit which charges the commission of one crime, and if said person is not indicted for the commission of said crime, the papers seized cannot thereafter be received in evidence against said person when on trial for another crime.

The fifth question certified (fol. 8) evidently grows out of the seizure under the search warrant of June 17, 1918, of the unexecuted written agreement between Gouled and Lavinsky, which was delivered to the United States Attorney. The search warrant under which said paper was seized was based on an affidavit which charged that said paper was used as the means of committing a felony in violation of Section 39 U. S. C. C., to wit, the bribery of a certain officer of the United States (fol. 3). Gouled was not indicted for the offense described in said search warrant (fol. 3). As heretofore stated, after indictment and before the

trial, Gouled made a motion to compel the District Attorney to return to him "all papers seized and taken from his office on the 17th of June and 22nd day of July, 1918, respectively, together with all memoranda, extracts, etc., made therefrom." The certificate states that this motion was denied so far as the paper above described was concerned (fol. 3). The opinion of the Judge who passed on said motion shows that it was denied on the ground that all the papers that had come into the possession of the District Attorney by virtue of said seizures were returned to him at the hearing of said motion, except the letter written by defendant to Podell, a co-defendant, which letter the Court before whom said motion came held was admissible against Podell. In spite of this statement in the opinion of the Court, the Certificate shows that on the trial the unexecuted written agreement between Gouled and Lavinsky above described was seized under said search warrant and was received in evidence against Gouled on his trial in October, 1918 (fol. 5). The certificate does not say whether or not said unexecuted written agreement was used by Gouled as the means of committing one of the crimes of which Gouled was convicted. Under our view of the question here involved, it is not material whether or not the said unexecuted written agreement was used as the means of committing a felony by Gouled.

Although the Espionage Act of June 15, 1917 (Chap. 30, Title 11, 40 Stats. at Large, 228) of which the Search Warrant Law is a part, was emergency legislation and was rushed through Congress under the pressure of war conditions, and in spite of the objection that it was unconsti-

tutional (Congressional Record, 1st Session, 65th Congress, pp. 1720, 1753, 1801, 1850, 1853, 1854, 1856, 1862, 1863, 1864, 2065, *et seq.*) it is obvious that Congress endeavored to safeguard the rights of the individual as much as possible because of the harsh and drastic character of this *ex parte* proceeding, by means of which the defendant's property and papers were authorized to be seized and taken from his possession in order to convict him of a crime. The law provides that a search warrant may be issued by a Judge or United States Commissioner when the property was used as the means of committing a felony, in which case it may be taken on the warrant from the house or other place in which it is concealed or from the possession of the person by whom it was used in the commission of the crime. Before issuing the warrant, the Judge or Commissioner must examine the complainant and any witnesses produced by him, on oath, and require their affidavits or depositions to be subscribed by them. The affidavits or depositions must set forth facts showing probable cause for believing the truth of the grounds of the application; and the Judge or Commissioner must be satisfied from said affidavits that there is probable cause to believe the existence of the grounds set forth therein before he is authorized to issue a search warrant. The search warrant must set forth, among other things, the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and must command the officer forthwith to search the person and place named for the property specified, and to bring it before the Judge or Commissioner. The warrant must be executed within ten

days, else it becomes void. When he seizes property under said warrant, he must give a copy of the warrant, together with a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him or in whose possession it was found or, in the absence of any person, he must leave a copy of the warrant and receipt in the place where he found the property. The officer must forthwith return the warrant to the Judge or Commissioner, and deliver him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken and of the applicant for the warrant if they are present, which return must be verified by the affidavit of the officer in the form required by the statute. If required, the Judge or Commissioner must deliver a copy of the inventory to the person from whose possession the property was taken. If the person from whose possession the property is taken desires to controvert the grounds on which the warrant was issued, the statute authorizes him to produce his witnesses before the Judge or Commissioner who issued said warrant, who must proceed to take the testimony of the witnesses in relation thereto, which testimony must be reduced to writing and subscribed by each witness. If it appears that the property or paper is not the same as that described in the warrant or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the Judge or Commissioner must cause the papers to be restored to the person from whom taken; but if the Judge or Commissioner is of the opinion that the property or papers taken are the same as that described in the warrant and that there

is probable cause for believing the existence of the grounds on which the warrant was issued, he shall order the same retained in the custody of the person seizing it or to be otherwise disposed of according to law. Section 17 of said Search Warrant Law provides that:

> "The Judge or Commissioner must annex the affidavit, search warrant, return, inventory and evidence, and if he has not power to inquire into the offense in respect to which the warrant was issued, he must at once file the same, together with a copy of the record of his proceedings, with the clerk of the court having power to so inquire."

It is plain from the provisions of said Act that Congress intended to restrict the use of the papers seized to the prosecution and trial of the felony described in the search warrant papers. A specific offense described under oath calls for and justifies the Judge or Commissioner in issuing the search warrant; the same specific offense must be set forth in the warrant directed to the officer; the same offense confronts the owner and possessor at the time of the seizure; the same offense justifies the detention by the officer until he makes his return; the grounds for the same specific offense must be controverted by the owner before the Judge or Commissioner; the lack of evidence establishing probable cause for believing the commission of this same offense compels the Judge to cause the restoration of the papers seized to the person from whom taken; the existence of probable cause for believing the person guilty, not of some other crime, but the particular crime charged in the affidavit, requires the detention of the papers by the officer seizing the same or such other

disposition as the Judge or Commissioner may order. The Judge or Commissioner, if he has the power, must inquire into the commission, not of some other crime, but the very offense in respect to which the warrant was issued; and if he has not such power, he must deliver the search warrant papers to the clerk of the court who has power to inquire into the offense in respect to which the warrant was issued.

Can there by any clearer exposition of the purpose of Congress and of its intended restrictions on the use of the seized papers than the language of the Act itself? The person from whose possession the papers are taken must have notice of the particular crime which he is charged with having committed by means of the seized papers. He is also provided a summary and expeditious method of contesting the existence of the specific grounds set forth in the affidavit on which said warrant was issued, and if he is unsuccessful in said contest the papers are to be detained only in connection with the prosecution of the offense described.

Suppose that on the hearing before the Judge or Commissioner issuing the warrant provided for in Sections 15 and 16 of said Act, it should appear that there was no probable cause for believing the existence of the ground on which the warrant was issued, but suppose the United States District Attorney should object to the restoration of the papers on the ground that he had evidence that the owner from whose possession they were taken had committed another crime, and that he desired to use said papers to indict and convict said owner of said other offense, could the Judge or Commissioner, in the face of the statute directing the restoration of the papers, hold them in order to

enable the District Attorney to use them as evidence to convict the owner of another crime? Or suppose the District Attorney while the papers were in the possession of the officer making the seizure and before the hearing authorized under Sections 15 and 16 of that law, should use said papers before the Grand Jury in procuring an indictment against the owner for another crime, would the Judge or Commissioner be authorized or justified in refusing to obey the command of the statute to compel the restoration of the papers to the owner? It can be readily seen how the District Attorney can abuse the advantages and rights conferred on him by Congress to aid him in the prosecution of a specified offense, if he is permitted to use said papers to convict the owner of a different offense from that named in the affidavit. Suppose the property seized was not the property described in the search warrant, would the Judge or Commissioner, merely because the officer of the law had possession of said papers, be justified in holding them for the use of the District Attorney in the prosecution of the crime charged or of any other crime?

Notwithstanding the seizure under the search warrant and in spite of the fact that the papers are in the actual custody of the officers of the law for a specific purpose, they are still the owner's private property and are otherwise burdened with and subject to all the rights of privacy that inhered in said papers when in the actual possession of the owner. One of the most important objects Congress had in mind in the passage of said law was to prevent the use of the seized papers for any other purpose than that described in the affidavit and warrant; and if Congress has not accom-

plished this purpose the rights of the defendant under the Fourth and Fifth Amendments have not been safeguarded. The use made by the Government in this case of the unexecuted written agreement between Gouled and Lavinsky constituted a flagrant violation of defendant's rights under the Fourth and Fifth Amendments; and the trial court committed error in receiving in evidence against Gouled the unexecuted Lavinsky contract seized under a search warrant charging a different offense from that of which Gouled was convicted.

POINT V.

The sixth question should be answered in the affirmative.

The sixth question certified by the Circuit Court of Appeals is

> "If papers of evidential value only be seized under a search warrant and the party from whose house or office they are taken be indicted;—if he then move before trial for the return of said papers and said motion is denied—is the court at trial bound in law to inquire as to the origin of or method of procuring said papers when they are offered in evidence against the party so indicted?"

We are not informed by the certificate what issues of law and fact were involved on the decision of the motion made by Gouled to compel the return of the papers seized by the government under the search warrants dated June 17, 1918, and July 22, 1918 (fols. 4 and 5).

The opinion of the judge who denied the motion (*United States* v. *Gouled*, 253 Fed. Rep. 770) shows that the basis of the motion was that the search for and seizure of Gouled's papers was in violation of the fourth and fifth amendments to the Federal Constitution. It appears from the opinion that the court really denied the motion because the papers seized that had come into the hands of the District Attorney were returned at the time of the hearing of the motion before the court, except the letter sent by Podell to Gouled, which letter was referred to in the indictment as a letter sent in violation of Section 215 of the U. S. C. C., and it further appears from said opinion that the District Attorney asserted that said letter would be used as an exhibit on the trial. The court, in disposing of said motion, said that this letter was clearly admissible in evidence against Podell and should not be returned to defendant and thereupon denied the motion to compel the return of the papers. The certificate of the Circuit Court of Appeals shows that papers seized under said search warrants other than the Podell letter were received in evidence against Gouled (fols. 3 to 5).

The court in disposing of the motion does, in effect, state in its opinion that the papers were seized by virtue of a search warrant and that a search warrant could be issued as the means of obtaining evidence of crime (253 Fed. 770). This, in our opinion, is mere *dictum*, as it seems to us from the court's opinion that it denied the motion for the reasons heretofore stated. The court also stated in its opinion that the question whether the use of the evidence obtained by means of the search warrant compelled the de-

fendant to be a witness against himself was prematurely raised, and that the question as to whether there had been a violation of the fifth amendment should be decided when the proof was offered on the trial (253 Fed. 771).

The trial court is not prevented, by the denial of the preliminary motion to compel the return of the papers, from going into the question as to whether or not there was an unreasonable search and seizure under the fourth amendment or whether defendant was compelled to testify against himself in violation of the fifth amendment.

In the first place, the court in denying the motion to compel the return of Gouled's papers in effect holds that the search warrant was valid because by means thereof the government seized a letter written by Podell to defendant, which the court held was admissible in evidence against Podell and therefore, for that reason, the motion to compel the return thereof should not be granted. We are justified in inferring from the opinion that this was the only paper seized that was then in the possession of the District Attorney. So we contend that the opinion of the District Judge who passed on said motion shows that the question of lawful search and seizure under the fourth amendment was not passed on by the court in disposing of said motion and was not necessary to the disposition thereof. This question therefore was an open one for the consideration of the trial court on defendant's objection to the testimony when offered on the trial.

In the second place, there is no rule of the "law of the case" or *stare decisis* to prevent the trial court passing on the question of an unreasonable search and seizure in violation of the fourth

amendment. The burden is on the Government to show that the issues of law and fact involved in the disposition of said motion were such that the trial court should follow the decision of the court thereon in passing on the objection made by Gouled on the trial to the admission in evidence of the seized papers. The Government has failed to sustain this burden.

Even if said motion had been denied on the ground that the search and seizure did not violate Gouled's rights under either the fourth or fifth amendment, the trial court was not obliged to follow the ruling of the judge who heard said preliminary motion.

In *Plattner Implement Co.* v. *International Harvester Co.*, 133 Fed. 376, Judge SANBORN, speaking for the Circuit Court of Appeals, 8th Circuit, in discussing the question of one judge being bound by the decision of another judge of coördinate jurisdiction on the same question, said:

> "It is now contended that the ruling of the trial judge was right because he was not bound by the prior erroneous opinion of the resident judge upon the legal question whether or not a factor's lien may arise without an agreement of the parties. On account of the rule laid down in *Shreve* v. *Cheesman*, 69 Fed. 785, that rule is 'that the various judges who sit in the same court should not attempt to overrule the decisions of each other, especially in cases involving rules of practice. It is not unworthy of notice that the judge who tried the case below did not treat this rule as so imperative, that he thought it necessary to follow it in the disposition of the defense relative to the Nelson mower, but he directed a judgment for the defendant upon that defense, although the resident judge had previously sustained a de-

murrer to it as decisively as to the defense founded upon the alleged liens. On the other hand, he followed the rule in *Shreve* v. *Cheesman* in the trial of the latter defenses and refused to receive any evidence in support of them. The rule in *Shreve* v. *Cheesman*, 69 Fed. 785, is a rule of comity and of necessity. For obvious reasons, it applied with especial force to decisions which constitute rules of practice and of property, and by its terms it permits the 'most cogent reasons' such as a certainty that a previous ruling was erroneous, that no conflict would arise and no injustice would result from disregarding it, to present exceptions to it."

In *Wiggin* v. *Federal Stock & Grain Co.*, 77 Conn. 507, 516, Judge BALDWIN, of the Supreme Court of Connecticut, in discussing the effect of a ruling on a demurrer, said:

> "The jury were instructed that the ruling on the demurrer had conclusively established the validity of all the contracts, and removed any question as to that both from their consideration and from that of the court. While it is cutomary for a judge in disposing of points of law in a cause that may have been raised before other judges at an earlier stage of the proceedings to follow their decisions, he is not bound to do so. New pleadings intended to raise again a question of law which has been already presented on the record are not to be favored (*Hillyer* v. *Winsted*, 77 Conn. 304), but a determination so made is not necessarily to be treated as an infallible guide to the court in dealing with all matters subsequently arising in the case. If it be erroneous, and if the same point be presented in argument at a later stage of the proceedings, although before a different judge, he has the same right to reconsider the question, or to

> grant a rehearing on the issue closed on the prior pleadings, as if he had himself made the decision upon it. * * * As the prior ruling on the demurrer was correct, no injustice would have been done by the charge in this respect, had the question to which it pertained been in all respects the same as that which came before the jury. It was not the same. Evidence had been properly introduced upon the trial to show that a contract had been made with reference to the general customs and usages of those engaged in the kind of business conducted by the defendant. These usages formed a part of each contract. They might serve to explain the meaning of such terms as 'P. full' and the acts to be done by each of the contracting parties under certain conditions. These were matters which did not fully appear upon the face of the complaint."

So in the case before this court, the preliminary motion to compel the return of the papers was made on affidavits before trial (fols. 4-5). While it does not appear from the certificate what were the contents of said affidavits, it is probable that the facts set forth in said affidavit were not as full and complete as the facts that developed on the trial at the time Gouled objected to the introduction in evidence of the seized papers. In our opinion, the trial court was bound to pass on the objections urged by Gouled to the introduction in evidence of the papers which had been seized by the government under the search warrants of June 17th and July 22nd, 1918, and in so doing he was not bound to follow the decision of another judge of the same court rendered in passing on defendant's motion to compel the return of the papers as being seized in violation of his constitutional

rights. It was the right and duty of the trial judge to exercise his own independent judgment as to the validity of said objections, and if he believed, on full discussion and consideration of the questions of law and fact bearing upon the competency and relevancy of said testimony, that the ruling made on the motion by defendant to compel the return of his papers was erroneous and that no conflict would arise and no injustice result from disregarding it, he could, under the ruling announced in *Plattner Implement Co.* v. *International Harvester Co., supra,* decide the questions of law presented by said objections on his own personal views thereon. It would be a harsh rule, indeed, that would require the trial judge in such a case as this to follow a decision that he was satisfied was not the law—a decision that he felt sure would result in a reversal of the judgment of conviction, and especially one that involved the liberty of a citizen. The trial was the proper place where all the facts and circumstances bearing on the admissibility in evidence of the seized papers could be adequately and properly presented and developed, rather than on a motion made immediately after defendant's indictment, based on affidavits, when perhaps all the information relating to said seizures was not then known to the defendant and would probably not be developed until the trial.

If the sixth question is directed at the rule announced by some decisions that the trial court will not exclude evidence otherwise competent merely because it has been obtained in an unlawful manner, we have heretofore discussed this question under Point II of this Brief. This question, in our opinion, is answered by this court in the Silverthorne case, where it holds in substance that evidence obtained in violation of defendant's rights under the Fourth Amendment not only can-

not be used on the trial, but cannot be used *at all*. The trial court must therefore go into the question of the lawfulness of the seizure under the Fourth-Amendment when objection is made at the trial based on this ground.

Respectfully submitted,
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